WP(C) 1794/2007
BEFORE
THE HON'BLE MR JUSTICE AMITAVA ROY

JUDGMENT AND ORDER

The settlement of PTC Negherting Bodhboria Bazar (hereafter referred to as the Market) in favour of the respondent No. 3 by the Dergaon Municipal Board (hereafter referred to as the Board) has been assailed as illegal, arbitrary and unconstitutional. The petitioner being a competing tenderer seeks a writ of mandamus to be awarded the market for the current term.

2. I have heard Mr. TJ Mahanta, learned Counsel for the petitioner and Mr. PC Dey, learned Counsel for the Board.

3. By order dated 12/4/2007, this Court permitted the petitioner to cause service of notice of the proceeding on the respondents 2 and 3 personally. By an affidavit filed on 7/5/2007, the petitioner has avowed that on being approached with a copy of the aforementioned order and by the writ petition, the respondent No. 3 refused to accept the same. As on date, he has neither entered appearance nor has represented to be heard.

4. The abridged facts are that in response to a Notice Inviting Tender (for short NIT) issued on 11/1/2007 by the Board inter alia for settlement of the market for the period 1/4/2007 to 31/3/2008, the petitioner submitted on 14/2/2007 his tender along with the security money of Rs. 10,000/- as estimated in the NIT. Subsequent thereto, by letter dated 29/3/2007 issued by the Chairman of the Board, he was intimated that the market has been settled with him at his bid of Rs. 4,16,551/- and was asked to deposit Rs. 1,06,262/- in the Office of the Board by 31/3/2007. According to the petitioner, the said letter was received by him on 29/3/2007 at 9.30 PM. Though he tried his level best to arrange the said amount, he could not do so amongst others for the financial year ending on 31/3/2007. As 1st of April was a Sunday and the following day a Bank holiday, his endeavours to muster the funds proved fruitless and accordingly he on 3/4/2007 submitted an application before the Chairman of the Board praying for extension of time to deposit the same. As he waited in expectation for a positive response to his request, he came to learn that by an order dated 2/4/2007, the market had already been settled with the respondent No. 3. His request for a copy of the order of settlement was also declined. The petitioner has asserted that the impugned decision was taken without any prior communication to him or any opportunity to represent against the same. Though in the petition he averred that he was the sitting lessee of the market and that on the date of its filing, the respondent No. 3 had not taken over possession thereof pursuant to the impugned settlement, the petitioner by an application (registered as MC 1590/07) clarified that the statement was an inadvertent mistake as what was really intended to be stated was that the respondent No. 3 was not a sitting lessee. He, therefore, prayed that the averment to the said effect be deleted.

5. No affidavit in opposition has been filed by any of the respondents to the statements in the writ petition. The Board in its counter to the misc. application, however, has contended that the petitioner lacked in bonafide in claiming to be the sitting lessee though in the meantime following the order of settlement, an agreement has been executed by the respondent No. 3.

6. Mr. Mahanta has argued that the impugned order of settlement is patently unfair, unjust and discriminatory inasmuch as though the settlees of the other markets had been informed about the settlement much in advance so as to enable them to organize their resources to deposit the stipulated instalment, he was denied the said opportunity. The learned Counsel contended that in terms of the NIT, the agreement with the successful tenderer was to be executed before 26/2/2007 and whereas this was adhered to for the other awardees, it was departed from in his case. Moreover, in terms of Clause 11 of the NIT even if his tender was rejectable for his failure to deposit the instalment in time, the market ought to have been re-tendered. Mr. Mahanata urged that as respondent No. 3 was not a participating tenderer, settlement in his favour was per se invalid. The imp

ugned action besides being illegal also smacks of malafide, he urged.

7. Mr. Dey as against this submitted that the petition is liable to be dismissed, the petitioner having furnished distorted facts to mislead this Court. Referring to the NIT, the learned Counsel maintained that as a successful tenderer was obliged to deposit 1/4th of the offered bid within 24 hours of the intimation of settlement as required under Clause 5 thereof, the petitioner's complaint in the facts of the case is apparently frivolous. There being no bar, the petitioner being the sole tenderer for the Board, to settle the market, otherwise in view of his failure to deposit the required instalment within a stipulated period, the impugned decision cannot be faulted with. As the successful tenderers for the other market had approached the Board in time for extension of the period for the deposit of instalment and had made part payments, they could not be placed at par with the petitioner who remained totally inactive. Not only did he fail to deposit any amount what so ever, he abstained from approaching the Board for further time and, therefore, he cannot be heard to complain against, the impugned settlement. As the market has been awarded to the respondent No. 3 at the offer made by the petitioner, there is no loss of Government revenue and on that count as well, no interference with the impugned order is warranted, he urged. Mr. Dey also produced the official records in support of the submissions. To reinforce his arguments, he placed reliance on the decision of the Apex Court in Raunaq International Ltd. versus IVR Construction Ltd. and others, (1999) 1 SCC 492.

8. Mr. Mahanta who with the permission of the Court had inspected the records submitted that the same did not merit any credence as neither does it contain any note sheet nor the notice or the communications lodged therein bear any serial number as a stamp of their contemporaneity and authenticity. He argued with reference thereto that the process of settling the market with respondent No. 3 was initiated and completed on the very same date i.e. 2/4/2007 which by itself was an obvious index of undue favour extended to the said respondent. The impugned action being devoid of fairness and transparency is liable to be adjudged as inoperative, null and void, he urged.

9. The rival submissions have been duly assessed. The NIT issued by the Chairman of the Board on 11/1/2007 mention 14/2/2007 to be the date by which the tenders were to be submitted. It inter alia stipulated that in case a tenderer to whom the settlement is offered fails to accept it, his security money would be forfeited. Under Clause 5 thereof, the tenders were to be opened on 14/2/2007 and the successful tenderer would be required to deposit 1/4th of his bid within 24 hours of the intimation. Clause 6 laid down that in case the successful tenderer failed to make deposit in terms of Clause 5, his security money would be forfeited and the other tenderers in order of preference would be offered the settlement. Clause 8 specified 26/2/2007 to be the date by which the awardee would be required to enter into an agreement with the Board. Clause 9 and 11 covenanted that the balance of the settlement amount would have to be paid in nine monthly instalments on the failure whereof the security money would be forfeited and the market would either be re-tendered or run through a third party or by the Board.

10 The records reveal that the market Sub-Committee of the Board in its meeting held on 17/2/2007 examined the tenders for the six markets referred to in the NIT and inter alia recommended the petitioner for being awarded the PTC Negherting Bodhboria Bazar at his offer. The Board in its meeting held on 22/2/2007 approved the said resolution while dealing with other issues as referred to in the related minutes. The petitioner was communicated the decision by letter dated 29/3/2007 by the Chairman whereby he was required to deposit an amount of Rs. 1,06,262/- by 31/3/2007 and execute the agreement. From the chart produced by the learned Counsel for the Board in course of the arguments, it appears that the dates of intimation to the successful bidders and those for the initial deposit were as follows.

Sl. No.	Name of Market	Date of letter of intimation	Date for deposit.

1	Dergaon Town Daily Bazar	16/3/2007	21/3/2007	
2	Dergaon Public Bus Stand	27/3/2007	29/3/2007	
3	Dergaon Cattle Market	15/3/2007	16/3/2007	
4	Neheriting Chari Ali Dainik Bazar		16/3/2007	20/3/2007
5	3 No. Gate Dainik Bazar	16/3/2007	20/3/2007	
6	PTC Budhbaria Bazar	29/3/2007	31/3/2007	

11. It would thus appear that except for Sl. No. 1, 4 and 5, the other successful tenderers were granted 48 hours or even less for making the initial deposit. The chart further indicates that all other tenderers had made partial deposits before the dates so fixed and it was the petitioner who alone had either failed to make any payment or request for extension of the time therefor. The datas furnished in the chart further demonstrate that the agreements with tenderers were entered into much after 26/2/2007. From the above disclosures it is thus not possible to conclude that the flexibility in the observance of the NIT conditions conceded by the Board had been decisively to sideline the petitioner to his prejudice. The petitioner had been granted 48 hours to deposit the first instalment of 1/4th of his bid value though stricto senso under Clause 5 of the NIT, a successful tenderer was required to make the payment within 24 hours of the intimation of proposed settlement of the market. Not only did he fail to make the deposit, he did not consider it necessary to request for extension of time. The challenge to the impugned decision on this count therefore does not appeal to this Court.

12. There is, however, one more aspect having a vital bearing on the impugned settlement in favour of the respondent No. 3, which cannot be overlooked. The records reveal that on the receipt of the report of the Tax Collector on 31/3/2007 mentioning the petitioners failure to deposit the 1/4th of the bid value within the time allotted, the Chairman of the Board cancelled the settlement in his favour on 2/4/2007 and ordered for initiation of a process for awarding the market afresh by inviting applications from persons willing to accept it at the bid offered by the petitioner. The Chairman in his note dated 2/4/2007 made it clear that the fresh settlement ought to be made before 4/4/2007. In terms thereof, the Chairman on the very same date issued a notice to the above effect inviting applications from persons interested. It transpires from the record that in response to the said notice, the respondent No. 3 applied to the Chairman of the Board expressing his preparedness to accept the offer and on his application the Chairman on that day itself after consultation with the Vice Chairman and the Members of the Ward No(s) 8 and 9 settled the market with him at the petitioner’s offer. The respondent No. 3 on the very same day was communicated the said decision by Chairman and he (respondent No. 3) also made the required deposit on that date itself.

13. It is thus apparent from hereinabove that on the petitioner’s failure to deposit the first instalment, the settlement in his favour was cancelled by the Chairman of the Board and the market was awarded to respondent No. 3 on the very same date. Apart from the fact that the new process undertaken was completed in a day, it is apparent that it was conducted and pursued by the Chairman of the Board alone except for a consultation with the Vice Chairman and the Commissioners of Ward No. 8 and 9 before finally deciding to settle the market in his favour. In other words, the Board as such was not associated with the process.

14. Under the Rules of Procedure for the Sale of Pounds and Markets by Municipal Boards and Town Committees in Assam (hereafter referred to as the Rules) framed under section 147, 148 and 301 of the Assam Municipal Act, 1956, (hereafter referred to as the Act) all pounds which the Municipal Board decides to farm out and markets established by it or vested in or placed under the control and administration of the Municipal Board should be farmed out by tender subject to observance of rules and procedure for inviting tenders. For reasons to be recorded, the Board, however, in its discretion may reserve any such pound or mar

ket from lease and administer it directly.

15. In all, the records as produced before this Court and the sequence of events pertaining to the settlement of the market as noticed hereinabove present a casual an nonchalant approach of the Chairman of the Board visibly in violation of the Rules. The procedure adopted for grant of the market in favour of the respondent No. 3 lacks transparency and is illegal being in transgression of the Rules. It is manifest from the records that the decision of canceling the petitioner's settlement, his default notwithstanding and providing the market to the respondent No. 3 is not one of the Board. In face of the mandate of the Rules, the impugned decision therefore is unsustainable in law. The Rules having prescribed the procedure of making such settlement and the authority empowered in that regard any departure therefrom has to be at the pain of invalidation thereof. No material has been produced to predicate the Chairman's overriding power to cancel the petitioner's settlement and award the market to the Respondent No. 3 to the exclusion of the Board.

15. The decision in Raunaq International Ltd., supra, is of no avail to the respondent Board. No violation of any rule governing the procedure of allotment of the contract therein was in issue. The Apex Court while dwelling on the criteria bearing on the assessment of suitability namely the rate, quality of goods or services, financial soundness, capability, past experience and post contract services held that where a decision had been taken bonafide and a choice had been exercised on legitimate considerations and not arbitrarily, no interference under Article 226 of the Constitution of India is warranted. The statutory rules ordaining the authority and the procedure of settlement of a market in the case in hand being in force, no deviation therefrom merits judicial approval. The impugned decision of cancellation of the petitioner's settlement is unsustainable in absence of any resolution of the Board to the said effect. The allotment of the market in favour of respondent No. 3 as alluded hereinabove is in violation of the Rules and, therefore, is invalid and inoperative in law.

16. In the result, the petition succeeds. The decision to cancel the petitioner's settlement and to award the market in favour of respondent No. 3 is hereby adjudged illegal and unconstitutional.

The matter stands remitted to the Board for a fresh decision in accordance with the Rules and the relevant conditions of the NIT. As the term of settlement is for a year, the exercise as ordered should be completed as expeditiously as possible and in no case later than a fortnight from the date of receipt of certified copy of this order. No costs.